

Appl. No. : 10/776,123
Filed : February 11, 2004

REMARKS

A. Introduction

Pursuant to the request of Examiner Gherbi, Applicant submits the remarks herein, which are responsive to the issues discussed during the Examiner Interviews on May 4, 2007 and May 9, 2007. Applicant thanks Examiner Gherbi for contacting Applicant's attorney on May 4, 2007, and for further discussing the matter on May 9, 2007. Claims 1-57 are currently pending.

B. Amendment to the Specification

The specification has been amended to correct the priority statement. Applicant submits that the originally filed application inadvertently omitted application no. 09/288,869, now U.S. Patent No. 6,280,479 to Phillips from the priority statement. Applicant submits that the correction of the priority claim is proper because the current application is a divisional of parent application no. 09/698,489, now U.S. Patent No. 6,899,737, which correctly includes application no. 09/288,869 in the priority statement (application no. 09/698,489 being a continuation-in-part of application no. 09/288,869). Further, Applicant submits that the inventor declaration originally filed with the application also correctly claims the benefit of application no. 09/288,869. *See Exhibit A.*

Additionally, Applicant believes that no fee is required under 37 C.F.R. 1.17(t) for amending the priority statement because the rationale, as set forth in M.P.E.P. § 201.11, does not apply here. Under M.P.E.P. § 201.11, the following rationale for paying the fee is stated:

If, however, an applicant includes a benefit claim elsewhere in the application and not in the manner specified in 37 CFR 1.78(a), and the claim is not recognized by the Office as shown by its absence on a filing receipt (e.g., if the benefit claim is in a part of the application where benefit claims are not conventionally located, such as the body of the specification), the Office will require a petition and the surcharge under 37 CFR 1.17(t) to correct the benefit claim. *This is because the application will not have been scheduled for publication on the basis of the information concerning the benefit claim contained elsewhere in the application.*

See M.P.E.P. § 201.11 at page 200-69 to 200-70 (emphasis added).

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Here the application was published on August 19, 2004 and would not have published any earlier in view of the amendment to the priority statement because the amendment does not change the earliest priority date. Accordingly, Applicant submits that no fee is required for amending the priority statement as set forth above. However, if a petition and surcharge are required to change the priority statement, Applicant hereby petitions under 37 C.F.R. 1.78(a)(3) to accept an unintentionally delayed claim of priority under 35 U.S.C. 120. The entire delay between the date the claim was due under paragraph (a)(2)(ii) of 37 C.F.R. 1.78 and the date of this filing was unintentional. Please charge any additional fees as necessary, including fees under 37 C.F.R. 1.17(t), to account number 11-1410.

C. Christensen Reference Not Prior Art

With reference to currently pending Claims 38 and 48, the Examiner during the interviews cited International Publication No. WO 00/27317 to Christensen, in particular Figure 25, as possible prior art. However, Applicant submits that the foregoing reference is not prior art because Applicant's application claims priority benefit to application no. 09/288,869, now U.S. Patent No. 6,280,479, which pre-dates the Christensen reference.

Specifically, the Christensen reference claims priority to three applications: U.S. application no. 09/188,018; U.S. application no. 09/213,035; and U.S. application no. 09/348,431. However, Figure 25 from the Christensen reference first appears in U.S. application no. 09/348,431 to Christensen, which was filed July 7, 1999. Accordingly, Figure 25 in the Christensen reference has a priority date of July 7, 1999. However, Applicant submits that Claims 38 and 48 are supported at least by Figure 8 (shown below) of U.S. Patent No. 6,280,479 to Phillips, which was filed April 9, 1999. Because the Phillips '479 patent was filed on April 9, 1999, whereas the Christensen '431 patent was filed July 7, 1999, the Phillips '479 patent pre-dates the Christensen reference by several months. Accordingly, Applicant submits that the Christensen reference is not prior art.

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